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IN THE

Supreme Court of the United States.

October Term, 1906.
No. 140.

W. A. WALKER, Executor of the Estate of W. H. ANSLEY, Deceased, Appellant.

vs.

J. W. McLOUD, Trustee, and FRANCIS I. GOWEN, Receiver, of the Choctaw Coal and Railway Company, Appellees.

REPLY BRIEF FOR APPELLANT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Appellees in their brief, filed in this action, abandon the allegation set out in their answer, wherein they claim that the money used by Chadick in the erection of the buildings in controversy was used by him without the knowledge and consent of the officials of the Choctaw Coal & Railway Co., and claim that said company ought to have an equity in the building for the amount of money expended by Chadick in the erection of said buildings. That part of defendant's answer alleging that Chadick used the money for the erection of the buildings in this case, without the knowledge and consent of the officers of said Choctaw Coal & Railway Co., reads as follows: (R. 28-29): "For further answer herein defendants allege the truth to be that prior to the execution

of the Deed of Trust and erection of the house and buildings spoken of said Chadick was then manager of the Choctaw Coal & Railway Company and that he entered into an agreement, not as manager of said company, but personally, with Fritz Sittel, and one Edward Sittel, a citizen of the United States, by the terms of which agreement Fritz Sittel and Edward Sittel agreed that the said Chadick should receive one-third of the profits to be realized from the sale and rental of lands at South McAlister, the ownership of which was claimed by said Fritz Sittel, that said land was to be designated and treated as town sites and the said Chadick in compliance with his said personal agreement with the Sittels, and without the knowledge and consent of Hartshorn and Alderson, the beneficiaries named in said Deed of Trust, and without the knowledge of the Choctaw Coal & Railway Company, advanced a large sum of money belonging to the Choctaw Coal & Railway Company, for the erection of buildings aforesaid." The proof in this record shows that the Choctaw Coal & Railway Company through its President and Board of Directors, advised and directed the advancement of the money for the unlawful purpose of the erection of the buildings aforesaid. Fritz Sittel's deposition (R. 47), Chadick's deposition (R. 38), C. S. Jones' deposition (R. 45-46). The aforesaid evidence conclusively shows that the officers of the Choctaw Coal & Railway Company advised the advancement of the money aforesaid, and since the proof has been taken in this case appellees have abandoned the above theory set out in their answer as aforesaid, and it is now practically admitted by appellees that the buildings in controversy were built on the public domain by the Choteaw Coal & Railway Company in violation of the Act of Congress of 1888, that permitted the Choctaw Coal & Railway Company to build in the Indian Territory, and appellees do not now contend in their brief that they have any legal right or equitable right to said property, but state that they are in possession of the

same and that plaintiff in this action has no right to maintain this suit and appellees in their brief set up six reasons why plaintiff should not recover, none of which are substantial or valid reasons, or a valid defense to this case.

I.

First defense set forth by appellees reads as follows:

"This action is improperly brought against the parties defendant, for the reason that said parties had been discharged from their official duties and the property in controversy had passed to other hands when this action was brought." The question as to improper parties in this action was not raised in the trial court, and is raised for the first time in this court. This cannot be done. If there were improper parties to this action, it was the duty of defendants to raise this question in the lower court and if not raised there it is waived. Appearing and pleading to an action waives all misjoinder of parties. In further answer to the contention raised by appellees in their brief, that whatever equity the Choctaw Coal & Railway Company had in said property had passed to the purchasers of the franchise and properties of the Choctaw Coal & Railway Company, said purchasers being, to-wit, the Choctaw, Oklahoma & Gulf Railroad Company, has no merit whatever.

For the reason that the Choctaw Coal & Railway Company had no equity in said property and could not sell any, and furthermore, the receiver of the Choctaw Coal & Railway Company never undertook to sell the property in controversy and it was never legally in his possession, yet appellees say, on page 10 of their brief, as follows: "That whatever equities the Choctaw Coal & Railway Company had in this property by virtue of the improvements having been made with its money had passed to the Choctaw, Oklahoma & Gulf Railroad. This statement is misleading and J. W. McLoud,

who is attorney in this case, and was attorney for the Choctaw Coal & Railway Company at the time said company went into the hands of the receiver, and was trustee in the Deed of Trust, well knows that the above statement is not a fact, and is calculated to mislead the court, and that said property was never sold by the receiver nor treated as an asset of the Choctaw Coal & Railway Company, and that he, McLoud, as aforesaid on the 27th day of November, 1895, advertised as trustee the property in this action to be sold on the 30th day of December, 1895 (R. 19. Exhibit C.) This was about a year after the receiver had sold the property and franchises of the Choctaw Coal & Railway Company, yet McLoud, with full knowledge of these facts, would now try to procure this court to believe that the property in controversy was sold by the receiver, which he knows was not a fact. The purchasers of the property of the Choctaw Coal & Railway Company were expressly prohibited from acquiring any interest in the house and buildings situate off the right of way at South McAlister, I. T., which is the property in this action. (R. 58.) The property of the Choctaw Coal & Railway Company sold by the receiver is itemized (R. 75 to 101.) None of the property in controversy is contained in the list of itemized property sold by the receiver, and it could not be, and defendants admit in their answer that the property in controversy was in the hands of the trustee on December 13, 1895, when suit was filed in this action and that the same had never been disposed of before that time. The reason the receiver was made a party was because he had associated himself with the trustee in the control and completion of some of the buildings sued for in this action, and on June 24, 1895, when the Indian Sheriff sold the property in this action, the receiver in case 969, in connection with others, undertook to enjoin the sheriff's sale of the aforesaid property (R. 72.) This was about a year after said receiver had been discharged. However, the facts show in the injunction case

that the sale was made before the injunction was granted, and appellees have abandoned in their brief any defense made on that point as set up in their answer, and it will not be necessary to reply to that question further. The above facts set forth the reason why the receiver was made a party and defendants filed answer in this case and raised no objection as to improper parties and appellees could not raise that question now, and if they could, it would not be determinative of any issue in this case, as J. W. McLoud, the trustee, is a proper party and is before this court. This fully disposes of the first question raised by appellees.

II.

Second defense raised by appellees:

In answering the second defense raised by defendants, will say that this contention has been fully answered in appellant's brief, page 90. There is absolutely nothing in appellees contention on this point. It has been raised for the first time in their brief. If raised at all it must be raised in the trial court, not for the first time in the appellate court. Reynes vs. Dumont (La. Ed.) 32, p. 934. This suit was properly brought as it was a suit to enjoin a sale under a fraudulent Trust Deed, to cancel said fraudulent Trust Deed and give plaintiff possession of said property, and the suit could not have been brought in another court.

III.

Appellees in third defense state as follows:

"The statute of the Choltaw Nation did not authorize the sale made by Wm. Ansley, as deputy sheriff of Tobucksy county. Under the circumstances disclosed by the Record." Appellees say that the Choctaw statute did not authorize the sale of said property by said Indian sheriff, as disclosed by the Record, and appellees further say that said Choctaw sta-

tute is ambiguous and they undertake to give a construction of said Statute favorable to their case and against the construction placed on the Choctaw statute by the Indian authorities. Indian laws should be liberally construed and construed by the higher courts, according to the construction placed upon them by the Indian authorities themselves, when the Indian statute is not inconsistent with the Constitution, treaties and laws of the United States. The Indian statute under which the aforesaid sale was made being a statute not inconsistent with the Constitution, laws and treaties of the United States, should be construed by the courts according to the construction placed thereon by the Indian authorities. The Indian statute under which this sale was made was passed in 1888, by the Choctaw council. At that time there were some white people, who had built upon the public domain of the Choctaw nation, without authority of law and the statute was passed for the purpose of giving these people thirty days in which to sell and dispose of the improvements to some citizen of said nation, and to prohibit others from building on the public domain of said Choctaw Nation, and to give the Choctaw Nation authority to sell all property built on the public domain in the future in violation of law. Said statute gave the Choctaw authorities the right to sell property which had been forfeited to the Choctaw Nation by non-citizens, after advertising the same thirty days, and after the sale of said property, if the intruder refused to vacate the property the Choctaw sheriff would report that fact to the Chief, who would report the intruder to the United States Indian Agent, and ask the Indian agent to remove said intruder out of the nation. The construction placed on the statute as aforesaid, by counsel for appellees in this case, is contrary to the construction placed upon said Act by the Indians themselves. The Indians have full power and authority of self-government given them under the treaties and laws of the United States; said Indian

tribe had a perfect right to construe their own laws and the construction placed upon this Act by the Indian authorities is a proper construction, and it has been the policy of Congress, in dealing with the Indian tribes, to give due force and effect to the usages and customs of the Indian laws as construed by the Indians themselves under Act of Congress, June 10, 1896 (29 Stat. 321, 339).

Congress directed the Commissioners of the Five Civilized Tribes, that in passing upon the citizenship case of said tribes they should give due force and effect to the laws, usages, and customs of said tribes. The sale made by the Indian sheriff of the property in this action was strictly in accordance with the construction of the Choctaw statute, under which said sale was made, and according to the construction placed thereon by the Indian authorities. Said statute provides that where noncitizens have unlawfully built improvements on the public domain that the sheriff of each county shall advertise and sell the same within thirty days, to some citizen of the Choctaw Nation, and should said noncitizen refuse to deliver possession of said property that the sheriff shall report his action to the principal Chief of said nation, and said Chief shall have the intruder removed by the United States Indian agent. While the Choctaw statute says that the purchaser shall pay cash, this means that cash shall be paid for said property, when the intruder is removed, and possession is delivered to the purchaser, and it does not mean that cash shall be paid on the day of the sale, but the deeds are always executed on the day of the sale, which conveys a valid title from the Choctaw Nation to the purchaser of said property, and the property is paid for by the purchaser as soon as he obtains possession of said property, either by the nation or otherwise. This has been the construction placed on the Choctaw statute by the courts of the Choctaw Nation and by the Chief and other authorities, and it has also been the usage and the custom of

the Choctaw Nation since the statute was passed, in 1888. By reading the Choctaw statute, in regard to payment for the property when the same is sold, it is not just clear as to whether the payment should be made at the time of the sale or when possession of said property was obtained by the purchaser, but in order to ascertain the proper construction it must be construed according to the construction placed thereon by the Indian authorities, which has always been that payment is to be made when possession has been obtained, although the deed is executed when sale is made, and it is considered a valid sale from the date of the deed, and a sale for cash. In the case at bar deeds to the aforesaid property were executed on the day of sale by the nation to the purchasers, and payment was to be made when the purchasers obtained possession, which was a cash sale. This was in strict compliance with the Choctaw statute as construed by the courts of the Choctaw Nation, by the Chief of said nation, and it was the custom and usage of said nation. In sales of this kind it was usual and customary, and according to Choctaw statute for the purchase of the property to give to the sheriff making the sale some memorandum in writing showing how much he was to pay upon obtaining possession of said property. This memorandum was held by the sheriff, or his successors in office, until purchaser of said property obtained possession of the same, for it was well known that the purchasers of said property would likely not get possession of the same unless the Chief of the nation took action in his behalf, and assisted him through the United States Indian agent, or through the United States Court, after same was established in 1889 in the Indian Territory. Before the United States Court was established in the Indian Territory it was proper to report the intruder to the Indian Agent, for his removal, but after the United States Court was established in the Indian Territory, in 1889, as aforesaid, proceedings could be

had in said court to remove said intruder from the property and both the United States Indian agent, and the Untied States Court, had concurrent jurisdiction, and in the case at bar, proceedings were commenced in the United States Court, at South McAlister, for possession of said property, which was proper and right, and the Choctaw Nation assisted the plaintiff in the prosecution of this action, as it was its duty to do. Under the Choctaw laws, not only was the sale made by the Indian sheriff and the payment, according to the law of the Choctaw Nation as construed by the Choctaw authorities, but the sale of said Indian sheriff and the payment therefor was confirmed by the Chief of the Choctaw Nation. Said deputy sheriff states in his testimony (R. 50), that he made a full report of the sale and payment of said property to the Chief of the Choctaw Nation immediately after same was made, and that said Chief ratified and confirmed all his actions as to the sale and payment and directed him to employ counsel to represent the nation to assist the plaintiff in obtaining possession of said property, and that he at once employed lawyers to assist the plaintiff in obtaining possession of said property. The Chief was the head of the tribe and the executive officer and he had full power to see that the laws were properly executed. He was given this power under the Constitution of the Choctaw Nation. The Chief was directed, under Act of the Choctaw Council, approved Nov. 14, 1890 (R. page 7,) to employ counsel to represent the nation in any matters of interest to the nation that might come before the United States Court. After the Chief of the Choctaw Nation had received the report of the deputy sheriff as to the sale and payment of the property in controversy. Said Chief, when the council convened, about three months thereafter, made a full report to said Choctaw Council, as to the sale of said property and the payment therefor, and reported every action and detail of the transaction to the Choctaw Council, and the Choctaw Council, by special Act, ratified

and confirmed all of the acts of the deputy sheriff, as to the sale and payment, and directed the Chief of the Choctaw Nation, by special Act, to employ attorneys to further assist the plaintiff and to represent the Choctaw Nation in assisting plaintiff in obtaining possession of the property in controversy. This Act was passed October 30, 1895. Thus the Chief of the Choctaw Nation, and the legislative council, ratified and confirmed each and every act of the Indian sheriff as to the sale of said property and the payment therefor, for the same was in accordance with the laws and customs of the Choctaw Nation. (The above Act referred to on page 60, in Record, shows in the title of said act that the same was approved October 30, 1890. This is a typographical error. The proper date of the Act, when approved, was October 30, 1895, as shown at the bottom of said record page.) The sale was not only made in accordance with the Choctaw law, but the sale was confirmed and ratified by the Chief of the Choctaw Nation and the Council and it could not be made more valid and binding, and the sale was sufficient to convey title under the Choctaw Nation, and this court has held, in the case of McGuire vs. Blount, 199 U. S., page 142, that where a sale is made under a foreign system of laws that the sale should be construed according to the construction placed thereon by the authorities who made the same. The facts in the said case show as follows: This was a case for possession of land in the State of Florida, when the State of Florida belonged to Spain. A man by the name of Rivas had a will made to him by a man by the name of Morales, of Spain. After Morales' death, the will was probated, which was the 2nd day of May, 1808. Said will bequeathed unto Rivas a certain tract of land, in Florida. After the probation of said will the land was sold and the sale approved by the Civil and Military Governor of Florida. Caro and others bought said property, and made sale thereafter, to other parties and some 85 years afterwards the heirs of Rivas

filed suit for a portion of this property, claiming that the sale of said property, when made, was irregular, and not according to the law and that the same did not convey any title. The court, in passing upon the question, states as follows: "Various technical objections have been urged as to the regularity of the proceedings. Some of these might possibly have availed had they been urged as objections to the regularity in the forum where they were had, but it is to be remembered that we are here dealing with proceedings 85 years ago, under a foreign system of laws, by which it was undertaken to convey title to the premises. Such proceedings are not to be scrutinized with the view to discover defects. They were sufficient in view of those who had undertaken to pass title to the lands under the Spanish system, and our court should have neither the right nor the disposition to upset such titles by a nice examination of the regularity of the proceedings. Every presumption is in favor of the authority and the authenticity of such proceedings." Cases cited in opinion Strother vs. Lucas, 12 Pet. 410-438 6 Pet. 691, 927. If this decision is to be followed, then we must construe the Choctaw statute according to the construction placed thereon by the nation.

IV.

Fourth defense raised by appellees in the brief reads as follows:

"Such sale was a nullity because by force of the Choctaw statute and of the proceedings thereunder it was sought to adjudicate matters and issues of which only the courts of the United States in the Indian Territory had jurisdiction."

The above defense raised by appellees is so grossly foreign to the issues raised in this case that it scarcely needs reply. The Choctaw Nation in regard to the sale of the property, proceeded under the Choctaw law, according to

the Choctaw statute and was the proper procedure for the Choctaw Nation to dispose of the property that had been forfeited to said nation by an intruder. Appellees have set out in their brief, Article 7, of the treaty of 1855, and Article 43, treaty of 1866, and sections 2118 and 2147, Revised Statutes of the United States, and various Acts of Congress, establishing courts in the Indian Territory, and appellees further state, "that there were a certain class of persons not members of the Indian tribe who could live within the limits of the tribe, occupy lands and own improvements thereon." While certain classes of persons were permitted to live in the Indian Territory under the treaties aforesaid, such as persons employed by the United States Government, persons trading in the Indian country under licensed traders from the proper authority of the United States, and such other persons as might be permitted by the Choctaws and Chickasaws, with the assent of the United States Indian agent, yet these persons were limited in their rights in the Indian Territory, and while they were permitted to remain in the Indian Territory and were not subject to removal as an intruder, they were not permitted to open up town-sites on the public domain in the Indian country, and were not permitted to speculate in the public domain of the Choctaw Nation, or build houses and improvements on the public domain. In violation of the treaties and laws between the United States and the Indian tribes, the Choctaw Coal & Railway Company was also permitted to remain in the Indian country, under the Act of Congress and was permitted to build and own improvements on its right of way, but said Choctaw Coal & Railway Company was prohibited by Act of Congress from going off its right of way and prohibited from taking possession of the Indian lands, or placing buildings thereon, and when said railway company violated the Act of Congress and went off of its right of way upon the public domain of the Choctaw Nation, and erected buildings

thereon, said company forfeited all interest it had in said buildings to the Choctaw Nation and said buildings then and there became the property of said nation. Appelles say in their brief, on page 23, at the bottom, as follows: "In the case at bar it appears in the record that the improvements in question were made by a railroad company, operating a line of road in the Territory, by virtue of a lease made under contract of its manager, Edwin D. Chadick and two citizens, Fritz and Melvina Sittel." There is absolutely no proof in the record that the improvements in question were made under lease contract with Chadick, the manager of the railroad. The written instrument executed by Sittels and wife was a fraudulent Deed of Trust, for a pretended loan of money, which money was never borrowed. Testimony of Sittels (R. 48). Said fraudulent Trust Deed was a subterfuge and fraud upon the Choctaw Nation, and invalid. The Choctaw Coal & Railway Company knew it could not build or own improvements off its right of way, and by conspiring with Sittels and wife, in the execution of the fraudulent Trust Deed, said company could not do indirectly what it could not do directly. This fully disposes of this defense.

V.

The fifth defense raised by appelles in their brief reads as follows: "Such sale is nullity because the Choctaw statute and proceedings thereunder were in violation of the due process clause of the United States Constitution. It will not be necessary to reply to the due process clause of the Constitution of the United States raised by the appellees, as the same has been fully discussed in appellants brief, on pages 53 to 63, inclusive.

VI.

Sixth defense raised by appellees reads as follows: "Such sale is a nullity and ineffectual to pass any right to the plaintiff because of the failure of the officer to comply with the terms of the Indian statute, because under the general rules of law of the inadequacy of the construction and the substantial fraud depending upon the sale." This defense has been fully answered in appellant's first brief and also in the first part of this brief, as before said, when the property in controversy became forfeited to the Choctaw Nation that the sale of the Indian sheriff and the execution of the deeds by the nation made a complete transfer of title to the property in this action, and the same is sufficient to sustain an action of ejection or any other action. Appellees, in the discussion of this case, under defense sixth of their brief, and under opinion rendered by the Court of Appeals for the Eighth Circuit, set out in defendants' brief, and also of opinion of Commissioners of Indian Affairs, show that said opinions are based on cases where there were vested rights and not on questions of forfeiture. In the case at bar no vested right existed in the Choctaw Coal & Railway Company and no involuntary alienation took place under the sale. The prohibited Act of Congress prohibited said Choctaw Coal & Railway Company from building off its right of way; [redacted], the sale and alienation of the property was voluntary on the part of the nation. The property belonged to the nation and it voluntarily sold the same, under its laws and customs, to one of the citizens of the said nation. Nowhere have appellees been able to show in their brief, by citation of authorities or otherwise, that a sale made of property that had been forfeited to the government, was not a valid sale. Appellees have abandoned the theory of their case as alleged in their answer and have undertaken to make new issues in the brief in this case, not

made in the pleading, and are now standing purely on the defense, without any claim or right to the property in question. They admit that they are trespassers, in possession of said property without any right or title or interest, and that they are there in violation of law.

Appellants claim that a more perfect title could not be secured from the Choctaw Nation and the defense not having any vested rights cannot complain.

It is respectfully submitted that the appellant is entitled to recover in this action and that the decisions of the lower courts should be reversed, and the relief granted as prayed for in appellant's complaint.

Respectfully,

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